Office - Supreme Court, U. S.
FILED
MAR 1 1946
CHARLES ELMORE CROPLEY
CLERK

(11)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 904

ARROW PACKING CORPORATION and GEORGE NEWMAN,

Petitioners,

—vs.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING SPIELER,
Attorney for Petitioners.

SAMUEL MEZANSKY,
MOSES POLAKOFF,
Of Counsel.

Dated, New York, February 25th, 1946.

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Statement 2

Specification of Errors To Be Urged 8

Reasons for Granting the Writ 9

Table of Cases Cited:

Becher v. United States, 5 F. (2d) 45 (C. C. A. 2d, 1924) 14

Hammond v. United States, 127 F. (2d) 752 (C. C. A. Dist. of Col. 1942) 12

Hardcastle v. Bielby (1892), Q. B. 709, Collins, *J.* 11

Isbell v. United States, 8 Cir., 227 F. 788, 792 13

Karchmer v. United States, 61 F. (2d) 623 11

Lilienthal v. United States, 97 U. S. 237 12

Mortensen v. United States, 322 U. S. 369, 374 12

Nobile v. United States, 284 Fed. 253, 255 (C. C. A. 3rd, 1922) 10, 11

Paschen v. United States, 70 F. (2d) 491, 503 (C. C. A. 7, 1934) 10

PAGE

United States v. Cohen, 145 F. (2d) 82 (C. C. A. 2d, 1944) 9

United States v. Feinberg, 140 F. (2d) 592 (C. C. A. 2d, 1944) 9

United States v. Corlin, 44 F. Supp. 940 (D. C. S. D. Calif., 1942) 10

United States v. Food & Grocery Bureau of So. Cal., 43 F. Supp. 966 (D. C. S. D. Calif., 1942) 10

United States v. Tatcher, 131 F. (2d) 1002 (C. C. A. 3rd, 1942) 14

Wolf v. United States, 238 Fed. 902 (C. C. A. 4, 1916) 11

Other Authorities Cited:

Rule XI of the Criminal Appeals Rules promulgated May 7, 1934 2

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No.

ARROW PACKING CORPORATION and GEORGE NEWMAN,

Petitioners,

—VS.—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associated Justices of the Supreme Court of the United States:

Your petitioners, Arrow Packing Corporation and George Newman, respectfully submit this petition to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above entitled cause on January 29th, 1946, affirming the convictions of your petitioners in the United States District Court for the Southern District of New York.

Opinion Below

The opinion of the Court below (R. 226) has not yet been reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 29th, 1946 (R. 229). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

Questions Presented

1. Was there substantial evidence which excluded every other hypothesis but that of guilt to support the criminal liability of a corporation and its president for the acts of an employee?

2. Did the court below apply the correct standard of evidence necessary to send the case to the jury?

3. Did the trial court err in refusing to charge as requested?

Statement

The petitioners, together with one Jack Lorsch, a bookkeeper cashier employed by the petitioner, Arrow Packing Corporation were named as defendants in two informations for selling meats at higher prices than the maximum prescribed by the Office of Price Administration, and for failure to keep accurate records for inspection (R. 10-16; 27-31).

The first information concerned six different sales (R. 10-17); a second information concerned four (R. 27-31). In a third information, the petitioner, Arrow Packing Corporation and Jack Lorsch were charged with making eleven sales of meats at higher prices than the maximum pre-

scribed by the Office of Price Administration (R. 17-26). To each of the above counts there was added a count for failure to keep accurate records.

The petitioners were found guilty by a jury on all the counts. The petitioner, Arrow Packing Corporation was fined a total sum of $15,000 (R. 201, 204, 206). The petitioner, George Newman received a total prison sentence of ten (10) months and fined a total sum of $7,500 (R. 202, 206).

Jack Lorsch, who was named as a defendant in two of the informations, withdrew his plea of not guilty and pleaded guilty before the submission of the case to the jury (R. 4). He did not appear as a witness against the petitioners.

The petitioner, Arrow Packing Corporation was engaged in the sale of provisions at wholesale at 2283—12th Avenue, New York, N. Y. The actual connection of the petitioner, George Newman with this corporation does not appear clearly in the record. There is no evidence or testimony which relates to the powers, duties and responsibilities of the petitioner, George Newman or his precise connection with the petitioner corporation, although some witnesses testified that they believed petitioner, Newman to be "the boss".

Jack Lorsch was described by the various witnesses who appeared for the government as the bookkeeper for the petitioner, Arrow Packing Corporation who rendered the invoices and received payments for the products sold.

The government's evidence consisted of the testimony of five retail butchers, and of an official of the Office of Price Administration.

Briefly summarized, the testimony of the five retail butchers upon which the government solely relied for proof of the guilt of the petitioners was as follows:

One retail butcher named James H. Braun, testified that he began purchasing provisions of the petitioner, Arrow Packing Corporation approximately a year prior to his appearance as a witness in this case (R. 35). This witness testified that he purchased provisions at various times and that he received through the mails the invoices covering the purchases (R. 40). Once each week he gathered the invoices and paid the amounts appearing on their face (R. 40). At the end of each week, he made payment of the invoices to the bookkeeper of the petitioner corporation who was identified as the defendant, Jack Lorsch (R. 46). On some occasions he paid the exact amount of the invoices (R. 48); in other cases he paid additional cash to the bookkeeper over and above the amount stated on the invoices (R. 48-49). This witness could not recollect the amount paid in cash in excess of the amount as billed on the invoices (R. 49).

This witness made no mention of the petitioner, Newman. He did not testify that he ever saw Newman at petitioner's place of business. No testimony was given by this witness that the petitioner Newman was ever present when any cash payments were made to the bookkeeper and cashier, Jack Lorsch.

A second witness for the government, one George Lickel, testified that he purchased meat products from the petitioner corporation and paid to the bookkeeper, Jack Lorsch "little cash amounts" of money, which the bookkeeper demanded over and above the amount shown as due on the invoices rendered by the petitioner corporation (R. 92-93).

This witness testified that no one was present when the bookkeeper made these demands and when the payments were made (R. 98).

As for the petitioner, Newman, this witness testified that he had seen petitioner around the market (R. 103) and saw him infrequently at the place of business of the petitioner

corporation, probably only once or twice (R. 103). This witness testified that on most occasions the petitioner, George Newman was not present at the time he purchased meat products (R. 103). This witness did not know petitioner Newman's official connection with the petitioner corporation but knew that he had some interest in it (R. 104).

A third witness, Ralph Haft also testified that he made cash payments to the bookkeeper cashier in excess of the amounts appearing on the invoices rendered by the petitioner corporation (R. 113). He could not recall the amount of cash paid (R. 115).

This witness testified that he saw the petitioner Newman in the place of business of the petitioner corporation only occasionally, dressed in ordinary business clothes (R. 116). He testified that "he had an idea that petitioner Newman was the boss" (R. 117).

Another witness, Murray Meyers also testified that he was a retail butcher and purchased meat products from the petitioner, Arrow Packing Corporation (R. 132). He also testified that he made cash payments to the bookkeeper cashier upon demands made by the defendant Jack Lorsel (R. 135).

There was no testimony by this witness that the petitioner Newman was present when these cash payments were demanded or received. This witness testified that he saw the petitioner Newman only once or twice in the place of business of the Arrow Packing Corporation during the month of April (R. 136), although during that same month he went to the place of business of the petitioner corporation at least a half dozen times (R. 131). On that one occasion he had been waiting to make a purchase and during that time a truckload of provisions was delivered to the place of business of the petitioner corporation which was being moved into the icebox and nothing was being sold until the merchandise had been checked (R. 137). He tes-

tified that he saw the petitioner Newman go into the icebox after the merchandise had been delivered (R. 140). After a short interval, one of the salesmen came out and when the witness asked the salesman for some merchandise, the salesman said to the witness *not in the presence of the petitioner Newman* that he could not have any merchandise for "Newman is billing it all up for different purposes" (R. 140).

This witness testified that he knew the petitioner Newman was president of the petitioner corporation, although upon cross examination he admitted that he had no personal knowledge of that fact (R. 153-154).

The only witness who testified to any conversation with the petitioner Newman in respect to any purchase was the witness Durutei Bayobeni. This witness testified that on two occasions he purchased meat products and at the demand of the bookkeeper had paid cash sums over and above the invoice prices (R. 66-69). On the third occasion he testified that he purchased 100 lbs. of turkey for which he was charged by Lorsch $55. (R. 70). The witness in describing this transaction at first made no mention of the petitioner Newman. Upon further prompting, however, he testified that he "talked to the boss himself" identifying the petitioner Newman. The petitioner Newman is alleged to have told the witness that if he did not want the turkeys at $55. he need not take them (R. 71). This witness testified that the turkeys were delivered and that he paid to the driver whom he did not identify, the sum of $55. by delivery of a check in the sum of $44.50 and cash in the sum of $10.50 (R. 72). The only other time this witness testified he saw this petitioner was when petitioner came up to his place of business to collect the check which had been returned for insufficient funds (R. 73). Criminal proceedings were commenced against this witness and the charge against this

witness was disposed of by payment to the petitioner Newman of the amount of the check in the sum of $44.50 which represented the ceiling price of the turkeys (R. 74).

The final witness for the government, Emil Mang, a price specialist for the Office of Price Administration, testified to the ceiling prices which prevailed for the meat products during the period embraced by the informations involved (R. 157-170).

At the conclusion of the government's case (R. 171-178), and at the conclusion of the entire case, counsel for petitioners moved for a dismissal and a directed verdict of acquittal. The motions were denied, although the trial judge admitted that the evidence against the petitioner Newman was not strong (R. 176). The trial court also stated that if there could be more proof than there is in the record "it would be more satisfying as to (petitioner) Newman's alleged connections with the offenses charged in the informations" (R. 178). The trial court admitted that the overpayments were not made in the presence of the petitioner, Newman, but in its instructions to the jury, left it to the jury to determine whether there was "other evidence indicating that it was done to his (petitioner's) knowledge and approval" (R. 140). The trial court, in its various rulings upon the evidence, left it to the jury to determine whether "there are other facts and other circumstances" which would give petitioner Newman knowledge that these overcharges were being demanded and received by Lorsch acting as bookkeeper for the corporation (R. 94-97; 120-122; 139; 140).

Before the submission of the case to the jury, counsel for the petitioners requested the trial court to charge as follows (R. 196):

> "To warrant a conviction on circumstantial evidence each fact necessary to the conclusions of guilt must be

proved beyond a reasonable doubt, and all the facts so proved must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken all together, must be of a conclusive nature and producing in effect a reasonable and moral certainty that the accused committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to create and justify full belief according to the standard rules of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused. The facts so proved must be incompatible with innocence and incapable of explanation upon any other reasonable theory than that of guilt."

This request was denied and exception duly taken (R. 190).

The Circuit Court of Appeals affirmed the judgment of the petitioners as to all counts except the second count of the first information. As to that count, the Circuit Court of Appeals reversed the judgment of conviction (R. 229).

The Circuit Court of Appeals in its opinion concluded that in view of the testimony of the witness, Bayobeni the jury was required to infer that the petitioner Newman was a confederate of Lorsch in all the purchases and sales (R. 227).

Specification of Errors To Be Urged

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that there was sufficient evidence which excluded every other hypothesis but that of guilt, justify-

ing the submission of the question of the guilt or innocence of the petitioners to the jury.

2. In holding that the Trial Court did not err in refusing to charge as requested.

3. In affirming the judgments of conviction.

Reasons for Granting the Writ

In recent years, the Circuit Court of Appeals for the Second Circuit has consistently applied a standard of evidence in criminal cases necessary to send a case to a jury which appears to be basically inconsistent with the generally accepted principles of law.

In *United States* v. *Feinberg*, 140 F. (2d) 592 (C. C. A. 2d, 1944) and in *United States* v. *Cohen*, 145 F. (2d) 82 (C. C. A. 2d, 1944), the Circuit Court of Appeals for the Second Circuit has ruled that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases; and that, given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the Court will look no further, the jury must decide and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt.

Although these decisions are not cited in the opinion of the lower court, it is apparent that the Court has applied the same standard, for under no other standard could evidence so meagre, so vague and so indefinite be submitted to a jury for determining the guilt or innocence of a person accused of a crime.

In this case, there was no substantial evidence that the petitioner Newman, authorized, directed or had knowledge of the alleged overcharges. No witness testified that the

petitioner Newman was present at any time that these overcharges were demanded by the bookkeeper and paid by the retail butchers.

Viewing the evidence introduced by the government in its most favorable light, the most we have is that on different occasions the bookkeeper demanded and received cash in unspecified amounts in addition to the prices appearing upon the invoices sent out by the petitioner corporation. The lower court in its opinion, judging the responsibility of the petitioners by the standards applicable in civil cases held criminally responsible the alleged president of the petitioner corporation and the petitioner corporation for the acts of an employee. The application of such a rule and such a standard is so clearly inconsistent with the applicable fundamental principles of law, that it plainly calls, we believe, for review by this Court.

It is well settled that the civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to the criminal law. *Nobile* v. *United States*, 284 Fed. 253, 255 (C. C. A. 3rd, 1922); *Paschen* v. *United States*, 70 F. (2d) 491 (C. C. A. 7, 1934); *United States* v. *Food & Grocery Bureau of So. Cal.*, 43 F. Supp. 966 (D. C. S. D. Calif., 1942); *United States* v. *Corlin*, 44 F. Supp. 940 (D. C. S. D. Calif., 1942).

It is further well settled that there is no criminal responsibility of a principal for the acts of his agent, unless the principal knowingly and intentionally aids, advises or encourages the criminal act committed by the agent.

In *Paschen* v. *United States, supra*, 70 F. (2d) 491, 503 (C. C. A. 7th, 1934), the court wrote as follows: "• • • civilly one is responsible for the acts and doings of his accredited agent acting within the scope of his authority, while one may be criminally liable only in case he inten-

tionally does that which the law denounces and penalizes. *Nobile* v. *United States* (3 Cir.), 284 F. 253."

At common law, the rule was firmly established that a principal could not be indicted criminally for the act of a servant.

In *Hardcastle* v. *Bielby* (1892), Q. B. 709, Collins, *J.* said at page 712: "It is a general principle of law that a man is not liable to be indicted criminally for the act of his servant."

It is important to bear in mind that the statute applicable to the offenses with which the petitioners were charged punished only *wilful* violations of the regulation. The element of wilfulness necessary to a conviction certainly demands the clearest and most satisfactory evidence before a corporation or an officer thereof could be held criminally responsible for the acts of an employee.

The lower court, in its opinion argues, that while it was possible that the bookkeeper was uniformly engaged in a course of unlawful dealing on his own account, it was not at all probable (R. 227). However, as the court held in *Wolf* v. *United States,* 238 Fed. 902 (C. C. A. 4, 1916), moral probability, however strong, cannot take the place of legal evidence and any inference of guilt which the jury may draw must be based on facts tending to show a plain and unmistakable commission of an offense.

In another case, *Karchmer* v. *United States,* 61 F. (2d) 623, it was held that a verdict of conviction, resting on speculation and conjecture, from evidence consistent with the theory of the innocence of the accused, cannot stand.

The trial judge admitted that the evidence against the petitioner Newman was not strong (R. 176). It is our respectful submission that there was no substantial evidence of fact which excluded every other hypothesis but that of

guilt, which warranted the submission of this case to the jury. The verdict of the jury in this case can only be supported by the application of the broad standard adopted by the lower court which fails to draw any distinctions between civil actions and criminal prosecutions. The theory of the Circuit Court of Appeals that fails to distinguish between civil actions and criminal prosecutions is fundamentally fallacious and destroys the foundations upon which our entire criminal jurisdiction is built.

In *Lilienthal* v. *United States*, 97 U. S. 237, this Court very explicitly stated tne distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify the jury in finding their verdict. There has been no modification by this Court of the quantums of evidence necessary to justify a conviction of an accused. There has been no relaxation of the requirements and the decision of the lower court which gives judicial support to the verdict of the jury in this case is a clear departure from the fundamental principles of law.

This Court and courts in other circuits have adopted a stricter standard of guilt and have not hesitated to scrutinize with care the record to determine whether the evidence was substantial enough to warrant the submission of the case to the jury.

In *Mortensen* v. *United States*, 322 U. S. 369, 374 this Court wrote that it would never hesitate to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict.

In *Hammond* v. *United States*, 127 F. (2d) 752 (C. C. A. Dist. of Col. 1942), the court wrote: "In the present case there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved guilty beyond a reasonable doubt. 'Unless there is substantial evidence of facts which exclude every other hy-

pothesis but that of guilt it is the duty of the Trial Judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him.' *Isbell* v. *United States*, 8 Cir., 227 F. 788, 792."

If the standard adopted by the lower court in this case is permitted to stand, many traditional principles and standards will be upset. Even a cursory reading of the lower court's opinion will demonstrate the extent to which the lower court has gone to support a verdict based entirely upon guess, suspicion and surmise. The court's logic, when resort is made to logic can be easily refuted. The lower court below reasons that the testimony of Bayobeni demanded the inference that the petitioner Newman was a confederate of the corporation's bookkeeper, in all the purchases.

It is difficult to perceive how an alleged isolated conversation with one retail butcher could have any logical or relevant connection with the other purchases entirely unconnected and made at entirely different times.

The lower court's further conclusion that there was evidence to support the verdicts upon the counts for failing to keep accurate records (R. 228) is the result of circuitous reasoning. The lower court argues that since the overcharges were paid in cash, and the receipts given were for the ceiling prices, the jury could not rationally have concluded otherwise than that books were kept in accordance with the receipts and were false (R. 228). This reasoning, of course, assumes that the overcharges were known to the petitioners—an issue upon which there was absolutely no clear or credible evidence. Of course, if you start with the assumption of petitioners' guilty participation, you are

bound to reach a conclusion of guilty participation. This is clearly begging the question.

Another phase of this case illustrates the general inadequacy of the trial. The entire charge of the trial court (R. 183-190) was general and failed to present clearly and adequately the issues of fact to be decided by the jury. The trial court made no reference to the informations or the nature of the offenses involved. There was no reference to the statute which was the basis of the informations and the jury was left completely in the dark as to its precise duty.

The requested instruction (R. 196) stated correctly the applicable principle of law *Becher* v. *United States*, 5 F. (2d) 45 (C. C. A. 2d, 1924); *United States* v. *Tatcher*, 131 F. (2d) 1002 (C. C. A. 3rd, 1942). The substance of the requested charge was not covered adequately in the charge of the Trial Court. Certainly, in a case based entirely upon circumstantial evidence, the trial court was required to give the requested instruction which stated a fundamental principle of law.

This case raises important questions on the administration of federal criminal justice. It is respectfully submitted that the guilt or innocence of the petitioners was not ascertained by the jury under appropriate judicial guidance. The evidence offered against the petitioners was weak and unconvincing. In appraising the jury's verdict, the Circuit Court of Appeals applied an entirely insufficient and improper standard.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify the case to this Court for review and determination, as pro-

vided by the Statutes of the United States, and that your petitioners may have such other and further relief in the premises as this Court may deem proper.

ARROW PACKING CORPORATION and
GEORGE NEWMAN,
Petitioners,
By IRVING SPIELER,
Attorney.

SAMUEL MEZANSKY,
MOSES POLAKOFF,
Of Counsel.

Dated, New York, February 25th, 1946.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	14

CITATIONS

Cases:

C. I. T. Corp. v. *United States*, 150 F. 2d 85 ..... 11, 12

Egan v. *United States*, 137 F. 2d 369, certiorari denied, 320 U. S. 788 11

Joplin Mercantile Co. v. *United States*, 213 Fed. 926, affirmed, 263 U. S. 531 11

Minnisohn v. *United States*, 101 F. 2d 477 11

Mousell Bros. v. *London and Northwestern Railway Co.*, 2 K. B. (1917) 836 12

New York Central Railroad v. *United States*, 212 U. S. 481 11

Zito v. *United States*, 64 F. 2d 772 11

Statute:

Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 58 Stat. 632 (50 U. S. C. App., Supp. IV, 901 et seq.) 2

Sec. 2 2

Sec. 4 2

Sec. 205 2

688036—46

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 904

ARROW PACKING CORPORATION AND GEORGE NEWMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 226–229) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 29, 1946 (R. 229). The petition for a writ of certiorari was filed March 1, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioners do not deny that sales at prices in excess of O. P. A. ceiling prices were made by an employee of petitioner Arrow Packing Corporation. The principal question presented is whether the evidence is sufficient to establish the responsibility of petitioners for these acts of the employee.

STATUTE INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 58 Stat. 632 (50 U. S. C. App., Supp. IV, 901 et seq.), provides in pertinent part:

> SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.
>
> SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.
>
> SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not

more than two years in the case of a violation of section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment.

STATEMENT

Three informations were filed against petitioners and Jack Lorsch in the United States District Court for the Southern District of New York (R. 10–31) charging violations of maximum price regulations established pursuant to the Emergency Price Control Act of 1942, in that they sold pork, other meat products, and poultry at prices in excess of the ceiling prices and failed to keep accurate records. The first information contained seven counts and named both petitioners and Lorsch as defendants (R. 10–16); the second contained 12 counts and named petitioner Arrow Packing Corporation and Lorsch (R. 17–26); and the third contained five counts naming the corporation and petitioner Newman (R. 27–31). The informations were consolidated for trial, and the jury found the corporation guilty on all counts of the three informations, and petitioner Newman guilty on all counts of the two informations in which he was named as a defendant (R. 4, 7, 9, 191).[1] The corporation

[1] During the trial Lorsch withdrew his plea of not guilty and pleaded guilty to all counts in both of the informations which named him as a defendant (R. 4, 7).

was sentenced to pay a fine of $5,000 on count 1 of each of the three informations, and $1 on each of the remaining counts, the $1 fines being remitted (R. 201, 204, 205). Newman was sentenced to five months' imprisonment and a fine of $2,500 on count 1 of the first information, a fine of $2,500 on count 2, and five months' imprisonment and a fine of $2,500 on count 1 of the third information, the imprisonment sentence under the first information to begin after service of the sentence under the third. Imposition of sentence on the remaining counts of the two informations was suspended, and he was placed on probation for two years to begin after service of the imprisonment sentences. (R. 202–203, 206–207.) On appeal to the Circuit Court of Appeals for the Second Circuit, petitioners' convictions were reversed as to the second count of the first information[2] and affirmed as to all other counts (R. 229).

Five retail butchers testified as to the sales at over ceiling prices, as charged in the various counts of the three informations, during the period from December 1944 to April 1945. Each testified that he was billed an amount which was proved to be the ceiling price and that he paid the amount billed, plus an extra charge which

[2] This count charged an illegal sale of cooked tongue (R. 11), but the evidence showed that no ceiling price had been established for this product (R. 168, 228–229).

was demanded by petitioners' codefendant Lorsch, cashier-bookkeeper at the corporation's place of business. The amount billed was paid by cash or check, but the overcharge was always paid in cash. (R. 36, 40, 44, 46, 50–51, 61, 67–69, 92, 93–94, 98–99, 100–102, 104–106, 111, 113–116, 118, 123, 132, 134–136, 142.) One witness asked for but was unable to obtain a receipt for the amount actually paid (R. 69, 73); and no witness ever received one for any more than the amount billed (R. 64, 68–69, 108, 119, 135).

These facts are not disputed. The other pertinent evidence relating to the issues raised by the petition is set forth in the Argument.

ARGUMENT

Petitioners do not deny that, as alleged in the counts as to which the judgments were affirmed on appeal, the retail butchers who testified for the Government were overcharged for meats purchased from the petitioner corporation. They claim, however, that there was no substantial evidence that they had knowledge of, directed, or authorized the overcharges made by their cashier and codefendant, Lorsch; and that consequently the case should not have been submitted to the jury (Pet. 2, 8, 9–13).

We think, however, that there was ample evidence to support the jury's finding, left undisturbed by the two courts below, that petitioner Newman, who was president of the petitioner

corporation[3] and obviously in charge at the corporation's place of business where the sales were made, was not only aware of and consented to the price violations, but in at least one instance took affirmative action to enforce payment of the overcharge, the benefit of which accrued to the corporate petitioner. In December 1944, when the ceiling price on turkeys was 44½ cents per pound (R. 163), Lorsch charged the witness Bayobeni 55 cents,[4] and the latter immediately complained to petitioner Newman, the "boss" at the Arrow Packing Corporation's place of business, that the price was too high. Newman, instead of disclaiming any responsibility or correcting the price, told Bayobeni, "If you don't want it you don't have to take it" (R. 71). Bayobeni asked, "Give me a break," and Newman replied, "I don't get a break myself. * * * So if you don't want it I am going to sell it to some other person" (R. 72). When the turkeys were delivered to Bayobeni's store, the truck driver insisted that Bayobeni's check be made out for no more than $44.50 (which represented the ceiling price for the 100 pounds of turkey) and that the balance of $10.50 be paid in cash; Bayobeni

[3] There can be no dispute that petitioner Newman was president of the petitioner corporation, as appears from petitioners' requested instruction No. 12 (R. 199), which the trial judge gave the jury (R. 185). The docket entries also show that the corporation's pleas of not guilty were entered "by George Newman, Pres." (R. 3, 6, 8).

[4] The charge was $55 for 100 pounds of turkey (R. 71–72).

was compelled to make payment in this manner in order to get the turkeys (R. 70, 72). When the check, which was made payable to the corporation (R. 79), was returned by the bank for insufficient funds, Newman went to Bayobeni's store to collect and threatened, "If you don't make that check good I am going to lock you up" (R. 73). Bayobeni again complained to Newman that "you charge me over the price" (R. 73), but Newman persisted, and finally obtained full payment of $44.50, the amount of the check, by instituting legal proceedings against Bayobeni (R. 73–74). Bayobeni wanted a receipt showing the amount paid for the turkeys, to prove to his partners that they had actually cost him $55, but Newman refused to give him one (R. 73). It was thus clearly shown that, at the very beginning of the period covered by the informations, Newman not only was aware of and consented to the overcharging, but personally forced payment of the full amount of the illegal charge by resorting to legal proceedings to obtain payment of Bayobeni's check made out to the corporation. Moreover, there was other evidence showing that Newman was in charge at the corporation's place of business and could not have been ignorant of what was going on. The corporation's cooler, where all the sales were made, was not very large, being only about 30 feet square—if ten people came in it became crowded—and "it had a little bit of an office on the side" (R. 147) where the custom-

ers paid their bills and overcharges to the cashier Lorsch (R. 46, 93–94, 98, 112, 113, 116, 118, 134). Some of the customers testified that when Newman was present (R. 103, 116, 136), he would greet customers at the door (R. 117, 137, 146–147) or stand outside of the cooler and talk and "kid" with the customers (R. 136, 144); and one testified that on one occasion in April 1945, when a shipment of meat was received, about 50 customers were kept waiting outside the cooler while Newman was inside "billing it all up for different purposes" (R. 137–140). Two of the five butchers who testified identified him as the "boss" at the Arrow Packing Corporation (R. 66, 71, 72, 73, 117); another said that he knew Newman was connected with the firm (R. 104, 117); and a fourth gathered that he was an officer of the corporation (R. 153). Bayobeni, moreover, was not the only customer who questioned the overcharge (R. 118), and although there was no evidence that anyone but Bayobeni made such complaint to Newman, it is hardly conceivable that he was ignorant of the black market flourishing in his presence in the small confines of the corporation's place of business. In view of Newman's presence and supervisory activity at the cooler and his insistence that Bayobeni pay the full price for the turkeys sold to him despite Bayobeni's protest against the overcharge, it cannot be said, as petitioners urge (Pet. 13), that "there was absolutely no clear or credible evidence" that the

overcharges were known to petitioners. There was, we submit, abundant proof that Newman was in charge at the corporation's place of business and that he knew of and participated in the illegal sales.

Finally, petitioners' rights were fully protected by the careful instructions given to the jury. After instructing them generally that "where the acts of the defendant may be given either an innocent or guilty construction, the jury is duty bound to give such acts the innocent construction rather than the guilty one" (R. 184), the court outlined the factors upon which the criminal liability of each of the petitioners depended.[5] It

[5] The full text of the instructions in this regard is as follows (R. 184–186):

"The Government introduced evidence that in certain sales of meat the defendant Lorsch collected cash from the customers in excess of what the Government claims was the ceiling price for the meats allegedly sold. The jury is instructed that unless the jury is satisfied beyond a reasonable doubt that the defendant, Arrow Packing Corporation, received the benefit of such cash and that the defendant Lorsch acted as the bookkeeper or agent of said corporate defendant, then the jury must find the defendant Arrow Packing Corporation not guilty.

"The Government introduced evidence that in certain sales of meat by the Arrow Packing Corporation, the defendant Lorsch, bookkeeper of the Arrow Packing Corporation, collected cash from the customers in excess of what the Government claims was the ceiling price for the meats allegedly sold. The jury is instructed that unless the jury is satisfied beyond a reasonable doubt, considering all the facts and circumstances of the whole case, that the defendant Newman participated in these sales or had personal knowledge of the cash collected by Lorsch

must be presumed that the jury followed these instructions, and, consequently, that its verdict was based upon findings that the corporation received

---

in excess of the ceiling prices; then the jury must return a verdict of not guilty as to the defendant Newman.

"The jury is instructed that the fact alone that the defendant Newman was the president of the Arrow Packing Corporation does not make him liable criminally for the acts of the defendant Lorsch. Before the defendant Newman can be convicted, the jury must be satisfied beyond a reasonable doubt by clear and convincing evidence that Newman wilfully participated in the acceptance of prices in excess of over the ceiling in violation of the regulations involved.

"In connection with the charge that has just been read, the jury is instructed that an employer is criminally responsible for the criminal acts and conversations of an employee when those acts and conversations occur in the regular course of and within the scope of the employee's duties in the business and when they are done pursuant to instructions from the employer for the benefit of the business.

"Certain witnesses have testified to certain conversations with the defendant Lorsch not in the presence of the defendant Newman. The jury is instructed that such conversations are not binding upon the defendant Newman as such and in determining the guilt or innocence of the defendant Newman, the jury may not consider any statements made by the defendant Lorsch to any of the customers named in the various informations, unless from the facts and circumstances of the whole case you are satisfied that Newman was aware of these conversations and their general substance.

"The jury is instructed that they are not to presume that the defendant Lorsch in accepting cash in addition to the ceiling charges for the meats sold acted under the direction or with the knowledge or consent of the defendant Newman. However, you may find that to be the fact if the evidence satisfies you beyond a reasonable doubt."

the benefit of the overcharges; that Newman wilfully participated in the acceptance of the overcharges; that the overcharges occurred "in the regular course of and within the scope of" Lorsch's duties and were made "pursuant to instructions" from and "for the benefit of" the corporation; and that the jury did not merely presume Newman's knowledge or direction of, or consent to, the overcharges, but were satisfied from the evidence beyond a reasonable doubt as to his direct complicity.

Contrary to petitioners' contention (Pet. 10–11), the intent of an agent may be imputed to a corporation in a criminal case (*New York Central Railroad* v. *United States*, 212 U. S. 481), even where intent is a necessary element of the offense (*C. I. T. Corp.* v. *United States*, 150 F. 2d 85, 89–90 (C. C. A. 9); *Egan* v. *United States*, 137 F. 2d 369, 379 (C. C. A. 8), certiorari denied, 320 U. S. 788; *Minnisohn* v. *United States*, 101 F. 2d 477, 478 (C. C. A. 3); *Joplin Mercantile Co.* v. *United States*, 213 Fed. 926, 935–936 (C. C. A. 8), affirmed, 263 U. S. 531), and even where the agent is only a salesman acting within the scope of his employment (*Zito* v. *United States*, 64 F. 2d 772, 775 (C. C. A. 7)). The corporate petitioner was therefore responsible for the acts of its responsible agents and codefendants—Newman, "the boss," and Lorsch, the cashier-bookkeeper—even though there was no evidence that higher officers (if any) of the corporation were cognizant

of the offenses (*C. I. T. Corp.* v. *United States*, 150 F. 2d 85) for, as the *C. I. T. Corp.* decision points out, the rule applied in the federal courts is that stated by Justice Atkin in *Mousell Bros.* v. *London and Northwestern Railway Co.*, 2 K. B. (1917) 836, 846:

> When a penalty is imposed for the breach of a duty, it is reasonable to infer that the penalty is imposed for the default of a person by whom the duty would ordinarily be performed.

2. Petitioners assert (Pet. 14) that they were prejudiced by the trial court's refusal to give the following requested instruction (R. 196–197).

> To warrant a conviction on circumstantial evidence each fact necessary to the conclusions of guilt must be proved beyond a reasonable doubt, and all the facts so proved must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken all together, must be of a conclusive nature and producing in effect a reasonable and moral certainty that the accused committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to create and justify full belief according to the standard rules of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused. The facts so proved must

> be incompatible with innocence and incapable of explanation upon any other reasonable theory than that of guilt.

The court had instructed the jury that (R. 187–188):

> Circumstantial evidence is legal and acceptable evidence. It is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. The circumstantial evidence must be such as to exclude every reasonable hypothesis except the fact sought to be proven.
>
> * * * Circumstantial evidence may be relied upon by a jury to support or bring about a conviction, but, as I said before, in order that that may come about, the circumstantial evidence must point to guilt, that is, to the exclusion of any reasonable hypothesis of innocence.

Obviously, the court's instruction was adequate, and petitioners make no attempt to point out wherein it is deficient. If anything, the charge given is more to the point and less confusing than the rejected instruction, and "it was plainly unnecessary for the judge to grant the request" (R. 228).

3. Petitioners assert generally (Pet. 14) that the charge was inadequate because it contained no reference to the statute or the nature of the offenses. Petitioners, however, made no objection

to the charge in this respect, nor did they request any clarification (see R. 190). The court made it clear that petitioners were charged with wilfully making sales of meat products at prices in excess of the ceiling prices (see R. 184–186). Thus all elements of these offenses were covered. The offenses charged were not involved ones, and the simplicity of the court's language was, we think, appropriate.*

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
ANDREW F. OEHMANN,
Attorneys.

MARCH 1946.

* Petitioners' contentions addressed to the counts charging failure to keep accurate records of the prices charged (Pet. 13–14) are inconsequential, since the $1 fines imposed on the corporate petitioner under these counts were remitted and, as to petitioner Newman, imposition of sentence was suspended not only on these counts but on seven other counts involving overcharges (see pp. 3–4, *supra*).

U. S. GOVERNMENT PRINTING OFFICE: 1946